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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

SUSAN MEYERS, Plaintiff and Respondent, v. LAURIE MEYERS, Defendant and Appellant.	A154912 (Sonoma County Super. Ct. No. SCV-257264)

Laurie Meyers appeals from a trial court order denying her request for attorney fees from her estranged sister, Susan Meyers, pursuant to Probate Code section 15642 and Civil Code section 1717.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. *The Trust Documents and Sale of the Property*

Laurie and Susan's parents (mother and father) owned two properties in Santa Rosa, California: their residence (the family home), and property on B Street (the Property). In 1991, mother and father established a trust, which they amended and replaced in 1999 (the 1999 Trust). The 1999 Trust provided that upon the death of the first trustor, the trust shall be divided into two trusts, "Trust A" and "Trust B." Upon the

[1] Undesignated statutory references are to the Probate Code. We refer to the sisters by their first names for clarity, intending no disrespect. We incorporate by reference the factual and procedural background in the parties' prior appeals, *Meyers v. Meyers* (May 22, 2017, A149403) [nonpub. opn.], and *Meyers v. Drain* (Sept. 15, 2017, A149850) [nonpub. opn.]. We recite only those facts necessary to resolve the issues in this appeal.

death or incapacity of the surviving trustor, Laurie and Susan would serve as successor co-trustees. The 1999 Trust contained a power of appointment provision and a no contest provision.[2]

Father died in 2000. The 1999 Trust was divided into Trust A and Trust B, and mother transferred the Property, and other property, to Trust B. Thereafter, Susan became estranged from mother and Laurie.

In 2003, mother amended the 1999 Trust (the 2003 Amendment). The 2003 Amendment invoked the power of appointment provision and provided that, upon mother's death, the Property would be appointed to Laurie, and the remaining property in Trust B would be distributed evenly between Laurie and Susan. The 2003 Amendment named Laurie as sole successor trustee of Trusts A and B in the event of mother's death or incapacity and included a no contest provision.

Mother lost the capacity to serve as trustee. In 2010, Laurie, acting as trustee of Trust B, sold the Property to Suzanne Manker (Manker) to pay for mother's care. Mother died in 2012. In 2014, Thomas Drain and Roy Loessin (Drain & Loessin) bought the Property from Manker.

II. *The Trust Petition and the Quiet Title Action*

In 2015, Susan filed a trust petition challenging, among other things, Laurie's authority to "unilaterally" sell the Property to Manker. Susan alleged the limited power of appointment provision was inconsistent with father's testamentary intent. Susan sought to remove Laurie as "co-trustee of the B Trust," alleging Laurie never contacted Susan when their mother lost capacity and later passed away, and that "Laurie's only actions as trustee of the B Trust have been to completely defund" it.

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[2] A "power of appointment" is "the power to dispose of property" in a trust. (*Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1595.) A no contest clause in a trust instrument " 'essentially acts as a disinheritance device, i.e., if a beneficiary contests or seeks to impair or invalidate the trust instrument or its provisions, the beneficiary will be disinherited and thus may not take the gift or devise provided under the instrument.' " (*Donkin v. Donkin* (2013) 58 Cal.4th 412, 422.)

Susan also filed a quiet title action against Drain & Loessin. The court consolidated the trust petition and the quiet title action and granted Laurie's motion to intervene as a defendant in the quiet title action. In a cross-petition, Laurie alleged Susan's trust petition and quiet title action violated the no contest clauses of the 1999 Trust and the 2003 Amendment. The court denied Susan's special motion to strike Laurie's cross-petition. (Code Civ. Proc., § 425.16.) We affirmed holding that Laurie demonstrated a probability of prevailing on her claim that Susan's petition violated the 1999 Trust's no contest provision. (*Meyers v. Meyers, supra,* A149403.)

In 2016, Laurie moved for judgment on the pleadings with respect to a number of causes of action in Susan's trust petition and with respect to the entire action to quiet title. Drain & Loessin joined in the motion for judgment on the pleadings as to the quiet title action. The court granted the motion, finding the trust documents unambiguously granted mother authority to appoint the Property to Laurie and Laurie had the power to unilaterally sell the Property. The court entered judgment for Drain & Loessin in the quiet title action.

Prior to entry of this judgment, the court stayed proceedings between Laurie and Susan pending Susan's appeal of the court's denial of her special motion to strike Laurie's cross-petition. For this reason, the judgment in the quiet title action applied to Drain & Loessin only. Susan appealed and Laurie cross-appealed. We affirmed the judgment for Drain & Loessin and dismissed Laurie's cross-appeal. (*Meyers v. Drain, supra,* A149850.)

III. *Drain & Loessin's Attorney Fee Motion*

In 2016, Drain & Loessin moved for attorney fees against Susan pursuant to Civil Code section 1717, arguing they prevailed in the quiet title action and that the real estate purchase agreement between Laurie and the initial purchaser, Manker, authorized an award of attorney fees to the prevailing party. Laurie filed a supporting memorandum of points and authorities. Susan opposed the motion.

The court denied the motion because Drain & Loessin and Susan were not signatories to the contract containing the attorney fee provision. The court found Drain

& Loessin "have not shown that [Susan] would actually have been entitled to fees under the purchase agreement as required under *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128. Specifically, [Drain & Loessin] fail to establish how [Susan] could have recovered attorney fees pursuant to a purchase agreement between the prior seller (Laurie Meyers) and the prior buyer (Suzanne Manker). There is no viable intended third party beneficiary claim or basis for plaintiff to 'stand in the shoes' of a signatory as assignee, co-venturer, successor or alter ego. Consequently, Civil Code § 1717 does not apply to impose reciprocity here."

The court also concluded the quiet title action was not based on the contract. The quiet title complaint did not mention the purchase agreement and in resolving the quiet title action, the court "was not required to interpret and determine the rights under the purchase agreement between Laurie Meyers and Suzanne Manker; it was called upon to interpret the Trust documents and determine whether Laurie Meyers was the sole trustee with the power to sell the [P]roperty to Suzanne Manker in the first place. . . . Accordingly, the court finds this was not an action seeking to enforce or determine rights under the purchase agreement, and there is no basis for awarding fees pursuant to Civil Code [section] 1717." Drain & Loessin did not appeal.

IV. *Laurie's Attorney Fee Motion*

After the court vacated its stay of proceedings between Laurie and Susan, and entered judgment for Laurie on Susan's trust petition, on Laurie's cross-petition, and on Susan's quiet title action, Laurie moved for attorney fees against Susan. Laurie claimed entitlement to attorney fees on a number of grounds, including pursuant to section 15642, subdivision (d), which authorizes an award of attorney fees when a petition for removal of a trustee is filed in bad faith. Laurie argued her sister's claims were frivolous and brought in bad faith because they lacked factual and legal support, were barred by the statute of limitations, and were motivated by spite. In supporting declarations, Laurie and her legal team averred Susan made unreasonable settlement demands and that Laurie was forced to sell the family home to pay the "sizeable" legal fees "she was forced to incur to defeat Susan's claims."

Laurie also sought attorney fees pursuant to Civil Code section 1717. She argued Susan's quiet title action "sought to invalidate" the real estate purchase agreements for the Property and therefore the quiet title action was on a contract for purposes of Civil Code section 1717. According to Laurie, her right to attorney fees was "not defeated by the fact that judgment for Laurie was not dependent upon the Court's adjudication of questions concerning" the purchase agreements.

Susan opposed the motion arguing Laurie already litigated the applicability of Civil Code section 1717 when she filed a memorandum supporting Drain & Loessin's motion for attorney fees and she was precluded from relitigating the issue. Susan denied Laurie's allegations of bad faith.

Following a hearing, the court denied Laurie's motion for attorney fees. It declined to award fees pursuant to section 15642, subdivision (d) because Laurie "failed to show that Susan acted in bad faith in seeking to remove her as trustee, which was a minor aspect of this litigation and one that Laurie has produced no evidence was brought in bad faith." With regard to Laurie's Civil Code section 1717 claim, the court noted it had "previously decided [the] case is not an action on a contract" and it declined to "rethink its legal reasoning on the application of Civil Code section 1717." Laurie appeals.

DISCUSSION

Laurie argues she is entitled to reasonable attorney fees under section 15642, subdivision (d), or Civil Code section 1717. We disagree and affirm.

I. *No Abuse of Discretion in Denying Attorney Fees Under Section 15642*

Section 15642, subdivision (d) provides: "If the court finds that the petition for removal of the trustee was filed in bad faith and that removal would be contrary to the settlor's intent, the court may order that the person or persons seeking the removal of the trustee bear all or any part of the costs of the proceeding, including reasonable attorney's fees." Thus, this subdivision "requires not only a finding of bad faith but also consideration of the settlor's intent as to a petition for removal of the trustee." (*Pizarro v.*

Reynoso (2017) 10 Cal.App.5th 172, 190.) Generally, "bad faith" concerns a party's subjective state of mind. (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 926, fn. 47.)

" 'On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.' " (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) "An award of attorney fees for bad faith constitutes a sanction [citation], and the trial court has broad discretion in ruling on sanctions motions. [Citation.]" (*Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1262.)

The parties dispute whether we should review the court's section 15642 ruling de novo or for an abuse of discretion. Arguing for a de novo standard of review, Laurie relies primarily on *Uzyel v. Kadisha, supra*, 188 Cal.App.4th at pp. 926–928, in which the Court of Appeal independently reviewed—and reversed—an attorney fee award, finding a trustee's opposition to a beneficiary's contest of the trustee's account was not without reasonable cause under section 17211, subdivision (b). The *Uzyel* court noted that "reasonable cause" is often synonymous with "probable cause" as used in malicious prosecution actions, that "probable cause" to prosecute an action means an objectively reasonable belief that the action is legally tenable, and that whether there was probable cause to prosecute an action is a legal question for the court to decide. (*Uzyel*, at pp. 926–927.)

But here, the court was not called upon to determine whether Susan filed her trust petition without reasonable cause; instead, the court had to decide whether "the petition for removal of the trustee was filed in bad faith and [whether] that removal would be contrary to the settlor's intent." (§ 15642, subd. (d).) The court agreed with Laurie that this statute applied, but found that, under the facts of this case, its elements were not met because there was no evidence of Susan's bad faith. This question is predominantly factual, not legal. For this reason, we apply the abuse of discretion standard. (See *Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 382, 391 ["if

the superior court applied the proper legal standards, the appellate court determines whether the result was within the range of the superior court's discretion—that is, whether there was a reasonable basis for the decision"].)

Laurie challenges the court's determination that Susan's request for removal of Laurie as trustee was a minor aspect of the litigation, contending the request "was based on *all* of the claims stated in her trust petition and quiet title complaint." But the court's point was simply that this protracted litigation focused on issues such as the mother's power of appointment, whether the no contest provisions applied, and whether subsequent purchasers held valid title to the Property. Moreover, the trial judge who ruled on Laurie's motion for attorney fees presided over a multitude of hearings between these parties for a number of years. We defer, as we must, to Judge Chouteau's determination that Susan's petition for removal of Laurie as trustee was not a major aspect of this litigation and that Laurie failed to show that Susan acted in bad faith. (*Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299, 304, italics omitted [" ' "Where the issue on appeal is whether the trial court has abused its discretion, the showing necessary to reverse the trial court is insufficient if it presents facts which merely afford an opportunity for a different opinion: 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' "].)

Laurie argues that Susan's trust petition and quiet title complaint were "completely frivolous" for a host of reasons. But as Laurie points out, " 'bad faith' in this context concerns the trustee's subjective state of mind and cannot be inferred from the absence of probable cause alone." (*Uzyel v. Kadisha*, *supra*, 188 Cal.App.4th 866, 926, fn. 47; see *SASCO v. Rosendin Electric, Inc.* (2012) 207 Cal.App.4th 837, 847 ["Usually, the phrase 'bad faith' refers *solely* to a party's subjective mental state."].) Laurie argues that the filing of an action that lacks probable cause is "evidence of bad faith." But in response, Susan draws our attention to some evidence—a letter from her

mother—to support her decision to initiate this litigation.[3] We discern no abuse of discretion in the court's determination that Laurie failed to show Susan was motivated by bad faith when she filed her trust petition and quiet title complaint. (*Tenderloin Housing Clinic, Inc. v. Sparks*, *supra*, 8 Cal.App.4th at p. 304.)

Laurie argues Susan should not have "continued to prosecute" her claims after fatal defects were brought to her attention and after adverse rulings by the trial court and the Court of Appeal. But the statute provides the trial court may award attorney fees if it finds "the petition for removal of the trustee was *filed* in bad faith." (§ 15642, subd. (d), italics added.) It does not address the continued prosecution of claims. We affirm the trial court's determination that Laurie was not entitled to attorney fees under section 15642, subdivision (d).

II. *Civil Code Section 1717 Does Not Apply*

"In any action on a contract, where the contract specifically provides that attorney's fees and costs . . . shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorney's fees . . . ." (Civ. Code § 1717, subd. (a).) " 'On appeal this court reviews a determination of the legal basis for an award of attorney fees de novo as a question of law.' " (*Eden Township Healthcare Dist. v. Eden Medical Center* (2013) 220 Cal.App.4th 418, 425.) "[T]o invoke section 1717 and its reciprocity principles a party must show (1) he or she was sued on a contract containing an attorney fee provision; (2) he or she prevailed on the contract claims; and (3) the opponent would have been entitled to recover attorney fees had the opponent prevailed." (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 820.)

"To determine whether an action is on the contract, we look to the complaint

[3] In opposing Laurie's motion in the trial court, Susan relied upon the same letter. Therefore we reject Laurie's suggestion that Susan waived appellate arguments based on the letter.

and focus on the basis of the cause of action." (*Brown Bark III, L.P. v. Haver*, *supra*, 219 Cal.App.4th at p. 821.) " 'An action (or cause of action) is "on a contract" for purposes of section 1717 if (1) the action (or cause of action) "involves" an agreement, in the sense that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement, and (2) the agreement contains an attorney fees clause.' " (*Eden Township Healthcare Dist. v. Eden Medical Center*, *supra*, 220 Cal.App.4th at p. 427.)

Laurie contends the contracts for the sale of the Property—first from Laurie to Manker, and then from Manker to Drain & Loessin—contain attorney fee provisions, and that Susan, in her quiet title action, sought to "invalidate those contracts." Laurie argues that even though "Susan was not a signatory to the Property sales contracts," "Susan claimed to 'stand in the shoes' of Laurie as beneficiary of the Property and she also claimed to be a third party beneficiary of the contract."

Reviewing the matter de novo, we are not persuaded that Civil Code section 1717 applies. First, Susan was not a party to the Property sale contracts and therefore Laurie was not "sued on a contract containing an attorney fee provision." (*Brown Bark III, L.P. v. Haver*, *supra*, 219 Cal.App.4th at p. 820.) Second, Laurie provides no authority for her claims that Susan either sought to " 'stand in the shoes' " of Laurie with respect to the sale of the Property or that Susan claimed to be a third party beneficiary of the sale. Instead, Susan's quiet title action was premised on the notion that Laurie had no authority to sell the Property in the first place. The resolution of this issue did not depend on interpreting the terms of a contract containing an attorney fee provision. (*Eden Township Healthcare Dist. v. Eden Medical Center*, *supra*, 220 Cal.App.4th at p. 427.) It was resolved based on the trial court's, and this court's, interpretation of the trust documents, not based on the purchase agreements. Thus, Susan's quiet title action was not "on a contract" for purposes of Civil Code section 1717.

In arguing otherwise, Laurie relies on *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, but her reliance is misplaced. In *Kachlon*, the plaintiff

homeowners sued for wrongful foreclosure and they also sought to quiet title to property in their favor. (*Id.* at p. 329.) The Court of Appeal affirmed their fee award because the promissory note and the deed of trust—both of which the plaintiffs signed— contained attorney fee clauses, and the "quiet title claim . . . sought to enforce the terms of the deed of trust requiring a reconveyance of title upon satisfaction of the underlying debt." (*Id.* at pp. 330–331, 348.) But here, Susan sought to quiet title to the Property based on her (mistaken) interpretation of the trust documents, not based on the contracts transferring the Property.

Laurie claims that if Susan prevailed then "she would have been entitled to contractual attorney fees," but the cases Laurie cites in support of this claim are inapposite. For example, in *Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, the court found the nonsignatory plaintiff would have been entitled to attorney fees if it prevailed because it sued for breach of contract as a third party beneficiary and the lease expressly identified the plaintiff as the proposed sublessee of the premises. (*Id.* at p. 383.) But here, as we have explained, Susan's quiet title action was based on the trust documents, not the contracts transferring the Property. Accordingly, we affirm the court's determination that Laurie was not entitled to attorney fees against Susan under Civil Code section 1717.

DISPOSITION

The order denying Laurie's motion for attorney fees is affirmed. Susan is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

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Jones, P.J.

WE CONCUR:

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Simons, J.

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Needham, J.

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